
1970-1979

Briefs

7-29-1976

Kentucky-Tennessee Clay Company v. Thomas A. Clapp, The Special Fund, and Workmen's Compensation Board

Appellee's Brief 1976-SC-0458

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s



Part of the [Courts Commons](#)

Repository Citation

1976-SC-0458, Appellee's Brief, "Kentucky-Tennessee Clay Company v. Thomas A. Clapp, The Special Fund, and Workmen's Compensation Board" (1976). 1970-1979. 958.

https://uknowledge.uky.edu/ky_appeals_briefs70s/958

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1976-SC-0458-03

{4B78750E-979D-4337-AAA9-CC49768A0B38}

{134932}{54-130304:091500}{072976}

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY
File No. 76-458

KENTUCKY-TENNESSEE CLAY
COMPANY - - - - - APPELLANT

versus

THOMAS A. CLAPP,
THE SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - - - - - APPELLEES

APPEAL FROM GRAVES CIRCUIT COURT
HON. SETH T. BOAZ, JUDGE

BRIEF FOR APPELLEE, THOMAS A. CLAPP

RON DANIELS
REED, MUIR & DANIELS
200 Pierce Lackey Building
Paducah, Kentucky 42001

Attorneys for Appellee, Thomas
A. Clapp

This is to certify that I have mailed copies of this Brief to Appellant, Kentucky-Tennessee Clay's attorney, Hon. John T. Carneal, Boehl, Stopher, Graves & Deindoerfer, 720 Citizens Bank Building, Paducah, Kentucky 42001; to Hon. John L. Pendley, Asst. Counsel, Special Fund, Frankfort, Kentucky 40601; to Hon. William Huffman, Director of Kentucky Workmen's Compensation Board, Frankfort, Kentucky 40601; and to Hon. Seth T. Boaz, Trial Judge, Graves Circuit Court, Mayfield, Kentucky 42066, on this the 15th day of July, 1976.

FILED
JUL 29 1976
MARSHA LAYNE COLLINS
CLERK
SUPREME COURT


Attorney for Appellee, Thomas A.
Clapp

TABLE OF CONTENTS

	PAGE
Statement of Questions Presented.	ii
Statement of the Case1- 3
Argument.3- 5
I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE WORKMEN'S COMPENSATION BOARD'S OPINION AND AWARD DATED NOVEMBER 3, 1975, IN WHICH THE BOARD AWARDED THOMAS A. CLAPP PERMANENT PARTIAL DISABILITY BENE- FITS BASED UPON 20% TO THE BODY AS A WHOLE.3- 4
Armco Steel Corporation v. Mullins, Ky., 501 S.W. 2d 261 (1973)	4
Island Creek Coal Company, v. Springer, Ky., 479 S.W. 2d 890.	4
II. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE WORKMEN'S COMPENSATION BOARD'S OPINION AND AWARD IN WHICH THE BOARD FAILED TO APPORTION LIABILITY FOR DISABILITY BENEFITS AWARDED TO THOMAS A. CLAPP BETWEEN THE EMPLOYER AND THE SPECIAL FUND PURSUANT TO KRS 342.120.4- 5
KRS 342.120.4- 5
Young v. City Bus Company, Ky., 450 S.W. 2d 510 (1969)	5
Conclusion.5- 6
Catalytic Construction Company, et al, v. Harley B. Ogburn, et al, 441 S.W. 2d 399 (1969).	6
KRS 342.120.	6

STATEMENT OF THE QUESTIONS PRESENTED

I. The Circuit Court did not err in affirming the Workmen's Compensation Board's Opinion and Award dated November 3, 1975, in which the Board awarded Thomas A. Clapp permanent partial disability benefits based upon 20 % to the body as a whole.

II. The Circuit Court did not err in affirming the Workmen's Compensation Board's Opinion and Award in which the Board failed to apportion liability for disability benefits awarded to Thomas A. Clapp between the employer and the Special Fund pursuant to KRS 342.120.

SUPREME COURT OF KENTUCKY
File No. 76-458

KENTUCKY-TENNESSEE CLAY COMPANY - - - - - APPELLANT

V.

THOMAS A. CLAPP,
THE SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - - - - - APPELLEES

BRIEF FOR APPELLEE, THOMAS A. CLAPP

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The Statement of the Case which has been tendered by the Appellant herein is, for the most part, factual and correct. Except for those references which would deny the existence of any objective evidence whatsoever regarding Mr. Clapp's current back condition, and statements concerning Mr. Clapp's prior "back problems," the Appellee will concur in Appellant's Statement of the Facts.

However, there is certain medical testimony elicited from the treating and examining physicians which was omitted, and which shed a great deal of light on the character and condition of the Claimant herein.

Much has been said about the "subjective" nature of the evidence which was presented to the Workmen's Compensation Board for consideration in this matter. Dr. Joseph P. Rowland, who examined Mr. Clapp at the request of the Appellant stated that he found limitation in Mr. Clapp's ability to "bend" and characterized this finding as objective in nature. (Dep. Dr. Rowland, page 7). Further, Dr. Allen Boyd who has examined

and treated the Claimant testified to certain objective findings on page 24 of his deposition.

Q. If Mr. Clapp were examined by an orthopedic surgeon in November, 1973, approximately two months after you saw him last, at which time he had a full range of motion, there was no prominent muscle spasms and no tenderness or loss of--excuse me--tenderness over the spinous process or the sciatic notches, deep tendon reflexes were brisk, active and equal, no sensory abnormality, nor was there any weakness of the extensor hallucis on either side, would this at all change your opinion on your diagnosis of Mr. Clapp?

A. No. That's essentially the findings as here.

Q. Again, that's basically a finding of no clinical evidence but based on subjective symptoms?

A. I think you would have to say objective evidence.

And again on page 10 of Dr. Boyd's deposition,

Q. All right. Would the impressions that you expressed on his first visit to you be essentially the same as of the time you saw him last in September?

A. Essentially so, although, the last visit he actually had more mechanical findings, more findings suggestive of lumbar disc disease, than he did certainly on the first occasion. (Dep. Dr. Boyd, page 10).

These "more mechanical findings" indicate more substantive or tangible evidence of the complaints mentioned.

Granted, a good deal of the evidence to be considered is subjective in nature, however, sufficient chemical and objective findings were present to substantiate the Board's award to Mr. Clapp.

Another point in Appellant's Statement of the Case on which the Appellee would take exception is the reference to Mr. Clapp's prior "back problems, or back conditions". The term "back problems" denotes a continual or permanent condition. A closer look at the Transcript of Evidence and history of Mr. Clapp reveals some back "injuries", but in no instance did those injuries result in any permanent or disabling results or condition. The evidence spotlights four injuries with a concomitant period

of recuperation ranging from one to three or four weeks; certainly not enough to be characterized as a "back problem". In fact at page 32 of the Claimant's Transcript of Evidence Mr. Clapp said:

Q. Did you miss any more than four weeks on any of those back injuries?

A. I don't believe so.

Q. When you returned to work after that injury were you able to perform the duties that you had been doing before you were injured?

A. Yes, sir.

Q. Without any problems?

A. Yes, sir. (T. of E. Thomas A. Clapp, page 32).

Certainly there is an obvious difference between what is alleged to be a back condition and which in fact are minor back injuries spaced over a period of time for which the Claimant missed approximately three to four weeks of employment.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE WORKMEN'S COMPENSATION BOARD'S OPINION AND AWARD DATED NOVEMBER 3, 1975, IN WHICH THE BOARD AWARDED THOMAS A. CLAPP PERMANENT PARTIAL DISABILITY BENEFITS BASED UPON 20% TO THE BODY AS A WHOLE.

Even a cursory review of the evidence presented in this case reveals a sufficient basis for the Board's Opinion and Award entered November 3, 1975. Appellant would have this Court ignore the evidence which has been presented as being vague, uncertain, or without probative value. (Brief for Appellant, page 10). Their argument in support of that contention is that two doctors found no permanent impairment while Drs. Ainsworth, Howard, and Boyd did diagnose a problem in the Claimant. Whether or not such diagnosis is based on subjective evidence, objective evidence, or a combination of both is of

little consequence. The weight and sufficiency to be afforded any evidence is strictly within the purview of the Workmen's Compensation Board; it is a factual question, not one of law, and, consequently, not subject to judicial review. Armco Steel Corporation versus Mullins, Ky., 501 S.W. 2d 261 (1973).

Obviously, if the evidence presented in any Workmen's Compensation proceeding is totally conclusive one way or the other, there would be little need for factual determinations by the Workmen's Compensation Board. However, Workmen's Compensation proceedings necessarily entail varying degrees of proof and evidence. In Island Creek Coal Company, versus Springer, Ky., 479 S.W. 2d 890 at page 892 it is stated:

"By its very nature, the fact to be proved, ie, probable ultimate reduction of working capacity by shortening of work life or a reduction of employment opportunities through a combination of age and physical impairment...is not capable of being proved with the exactitude. The Workmen's Compensation Board must therefore be allowed considerable leeway in its factual determination."

Taking the above citation and applying it to the facts presented in the case at hand requires an affirmation of the decision of the Workmen's Compensation Board and that of the Graves County Circuit Court.

ARGUMENT

II. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE WORKMEN'S COMPENSATION BOARD'S OPINION AND AWARD IN WHICH THE BOARD FAILED TO APPORTION LIABILITY FOR DISABILITY BENEFITS AWARDED TO THOMAS A. CLAPP BETWEEN THE EMPLOYER AND THE SPECIAL FUND PURSUANT TO KRS 342.120.

The apportionment of Workmen's Compensation Awards under KRS 342.120 requires a finding by the Board that the Claimant has a dormant non-disabling disease or condition which is aroused into disabling reality by a subsequent in-

jury which is work-connected. (KRS 342.120).

Appellant's position that "back problems" constitute such a disease or condition is just not true. Mr. Clapp missed work on some separate occasions for prior back injuries, but he was always able to return to his job without the necessity of lengthy hospitalization or medical treatment. Injuries in and of themselves do not constitute a "condition" as is set out in KRS 342.120. Were this the case, every person who has suffered momentary or minimal back injuries would have recourse to the Special Fund for compensation benefits.

Appellant's reliance on Young versus City Bus Company, Ky., 450 S.W. 2d 510 (1969) for the proposition that apportionment must lie, is erroneous. That case directs itself to the cause of the pre-existing disability, and in the case at bar, there is no evidence whatsoever of a pre-existing disability; only reference to some prior back injury. The Workmen's Compensation Board addressed itself to this point specifically on page two of its November 3, 1975 Opinion and Award wherein they stated that they were obligated to decide this matter on the basis of the record, (Opinion and Award of Workmen's Compensation Board, page 2), and the record is silent as to pre-existing conditions.

CONCLUSION

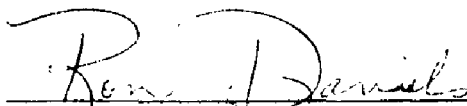
Addressing oneself to the issues presented indicate that Mr. Clapp dealt honestly with his doctors as evidenced by deposition taken which refer to him as a "straight shooter" (Dep. Dr. Howard, page 12), or as not being a malinger (Dep. Dr. Rowland, page 12). There are functional impairment ratings ascribed to Mr. Clapp's condition of 5%, (Dep. Dr. Carnesale, page 20), and 10%, (Report of Dr. Ainsworth). The fact that the Workmen's Compensation Board in their judgment translated

the functional percentages of 5% and 10% into an occupational disability rating of 20% is fully within the realm of their authority. These estimates of functional disability are submitted for that very purpose. Catalytic Construction Company, et al, versus Harley B. Ogburn, et al, 441 S.W. 2d 399 (1969).

Secondly, the question of apportionment was correctly decided by the Workmen's Compensation Board and the Graves County Circuit Court since there was no evidence presented concerning a pre-existing condition that contributed to Mr. Clapp's present problems. Such a requirement is a necessity under the provisions of KRS 342.120.

Because of the foregoing, the Opinion and Award of the Workmen's Compensation Board dated November 3, 1975 which was affirmed by the Graves County Circuit Court should be likewise affirmed by this, the Supreme Court of Kentucky.

Respectfully submitted,



RON DANIELS

REED, MUIR & DANIELS
200 Pierce Lackey Building
Paducah, Kentucky 42001

Attorneys for Appellee, Thomas
A. Clapp